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No. 82-1075

IN THE

Supreme Court of the United States
OCTOBER TERM, 1982

CPG PRODUCTS CORP. AND
GENERAL MILLS FUN GROUP, INC.,

Petitioners,

v.

ANTI-MONOPOLY, INC.,

Respondent.

MOTION FOR LEAVE TO FILE A BRIEF AMICUS
CURIAE AND BRIEF AMICUS CURIAE ON BEHALF
OF THE CHAMBER OF COMMERCE OF THE UNITED
STATES IN SUPPORT OF THE PETITION FOR A
WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

Pursuant to Rule 36 of the Rules of this Court, The Chamber of Commerce of the United States ("Chamber") hereby moves for leave to file the attached brief amicus curiae in support of Petitioners.¹ In support of this motion the Chamber states:

1. The Chamber is the largest federation of business organizations in the United States. At present, the Chamber has in excess of 235,000 members, including over 231,000 corporations, partnerships, proprietorships and individuals, as well as 12,400 trade associations and 2,700 local and state chambers of commerce.

¹ Petitioners have consented to the filing of the Amicus Brief, but respondent has refused consent.

2. The Chamber regularly presents its members' views to the courts on issues of broad importance to its members, and often files briefs in support of petitions for writs of certiorari.

3. The Federal Trademark Statute, 15 U.S.C. §§ 1051-1127 (Lanham Act), is the statutory premise for most of the trademark decisions that affect trademarks used in commerce in the United States. Many of the Chamber's members have trademarks that have acquired substantial good will and which are vital, not only to the continued operation of their business, but also to operation of the free enterprise system in the United States.

4. Because the Lanham Act is so fundamental to the maintenance of trademarks in the American economic system, it is important that it be interpreted uniformly and in a manner that is not unreasonably destructive of the economic system which it cornerstones.

5. The decision of the Ninth Circuit Court of Appeals adopts a new and bewildering definition of when a trademark is lost and when a trademark registration under the Lanham Act must be cancelled. The Ninth Circuit decision goes well beyond the intent of Congress, when it passed the Lanham Act and the court's decision has widespread potential impact on the vitality of trademarks in the United States and the economic interests of the members of the Chamber. Because the Ninth Circuit decision represents an extreme case of "judicial legislation" the Chamber believes that review by this Court is critical.

For these reasons, the Chamber requests the permission of the Court to file the attached brief which sets forth more fully its views on the need for review of this case.

Respectfully submitted,

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COMMERCE OF THE UNITED STATES IN SUPPORT
OF PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT**

This brief is filed on behalf of the Chamber of Commerce of the United States ("Chamber") contingent upon the Court's granting the Motion for Leave to File a Brief Amicus Curiae to which this brief is attached.

STATEMENT OF INTEREST

The interest of the Chamber is set forth in its Motion for Leave to File a Brief Amicus Curiae. The Chamber respectfully refers the Court to the Motion.

STATEMENT OF THE CASE

This case concerns the fundamental definition of a trademark under the federal trademark statute and, the closely related question, as to whether a trademark registered and granted "incontestable" status under the federal statute, may be cancelled even though the statute says there is a "conclusive presumption" of its validity.

The Ninth Circuit had before it the famous game trademark—MONOPOLY. It ruled that the motivation of the game purchaser was the critical element in determining the primary significance of MONOPOLY. If a prospective purchaser bought the product primarily because he liked certain unique and desirable product features, the trademark affixed to the product was a generic term and the trademark was invalid. In contrast, if the purchaser was motivated to buy the product primarily because of the purchaser's loyalty to and recognition of the manufacturer of the product, then the trademark affixed to the product was valid. The Court of Appeals rejected the findings of fact on this issue by the District Court and, instead, found that the evidence proved that, although 32% of the purchasers surveyed chose the game because of personal knowledge of or loyalty to Parker Brothers, the majority would purchase the MONOPOLY game because they like the playing features of the game. From this definition and evidence the Court of Appeals went on to hold that MONOPOLY was a generic term in the public domain, and that its long standing "incontestable" registration under the federal trademark statute should be cancelled.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals in the MONOPOLY case has caused consternation among the owners of numerous well known trademarks used in commerce in the United States. The decision radically departs from all prior trademark law and announces a "CATCH 22" definition of trademark validity which flatly contradicts the reality of trademark use in the marketplace. If the purchasing public does not like the features of a particular product and does not consider the product unique to some degree, the product dies for lack of commercial success and the issue of the genericness of the trademark applied to it is moot. On the other hand, if the purchasing public perceives certain unique and desirable product features and the product becomes a success, then, under the Ninth Circuit definition, the trademark is endangered and any registration therefor should be cancelled if the product is purchased primarily because of these desirable features.

The test adopted by the Ninth Circuit is completely unrealistic and sounds the death knell for well known, valuable trademarks simply because a certain percentage of purchasers choose products based upon a preference for particular product features rather than recognition and loyalty to the manufacturer. The name of the manufacturer of many commercially successful products is not generally known to the public. In such cases the Ninth Circuit test virtually guarantees a finding of genericness. Indeed, the test adopted by the Ninth Circuit is so unrealistic, that there is literally no trademark which has achieved any degree of commercial success that could not be threatened by this "either/or" test of loyalty. For the price of a simple survey, virtually any defendant in a trademark infringement action can threaten the validity of any trademark, regardless of how long it has been used, regardless of

how much has been invested, and regardless of what steps the trademark owner has taken to ensure its continued vitality by registration under the federal trademark statute. Trademark piracy is thus encouraged and public injury is threatened by such a substantial undermining of the United States trademark system.

The Ninth Circuit's decision also judicially nullifies one of the most important revisions in United States Trademark Law, codified in the Lanham Act of 1946. The congressional hearings which preceded the passage of the Lanham Act clearly indicate that Congress intended to impose a statute of limitations on those seeking to invalidate registered trademarks. In furtherance of that intent, the Lanham Act, as enacted, provides that a mark registered for a period of years, supported by appropriate affidavits of use, may become "incontestable" and thereafter its continued validity and registrability would be "conclusively presumed," under the statute. Although the incontestable status of the MONOPOLY trademark was argued and briefed before the Ninth Circuit, the Court did not deal with the issue of this conclusive presumption of the validity of the MONOPOLY trademark. By so ignoring the clear intent of Congress, the Ninth Circuit "legislated" the incontestability provision of the Lanham Act out of existence.

ARGUMENT

I. THE COURT OF APPEALS DECISION REQUIRING THE PROSPECTIVE PURCHASER TO CHOOSE EITHER LOYALTY TO PRODUCT FEATURES VERSUS LOYALTY TO THE MANUFACTURER OF THE PRODUCT IS A COMMERCIALLY UNREALISTIC LEGAL STANDARD AND IS CONTRARY TO ESTABLISHED TRADEMARK LAW

Traditionally, trademarks have been recognized as identifiers of the origin or source of particular goods or services, a function which has its origins in the uses to which marks were put in the middle ages.¹ However, the courts have long recognized the commercial reality that a trademark also serves more than one function in the marketplace. In today's modern economy, however, trademarks clearly also serve as indicators of a certain degree of uniformity or quality in the products to which they are attached.² This dual function, indicating the manufacturer as well as the nature or quality of the goods, has been repeatedly recognized and sanctioned by the courts. In fact, Mr. Justice Holmes emphasized the quality function over the source function in recognizing that the popular trademark, COCA-COLA, "probably means to most persons the plaintiff's *product* (since) *the product is more emphasized* than the producer." *Coca-Cola v. Koke Co.*, 254 U.S. 143, 146 (1920).

Over a period of many years, this Court has repeatedly recognized the propriety of the dual function of trademarks. A trademark has been defined by this Court to be "both a sign of the quality of the article and an assurance to the

¹ See, F. I. Schechter, *The Historical Foundations of the Law Relating to Trademarks* (1925), G. Ruston, *On The Origin Of Trademarks*, 45 TMR 727 (1955).

² F. I. Schechter, *The Rational Basis of Trademark Protection* 40 Harv. L. Rev. 813, 818 (1927), E. W. Hanak III, *The Quality Assurance Function of Trademarks*, 65 TMR 318, 319 (1975).

public that it is the genuine product of his manufacture." *Manhattan Medicine Co. v. Wood*, 108 U.S. 218, 222 (1882). Indication of source has been declared to be "the primary and proper function of a trademark," *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 412 (1915), but this Court has also expressly recognized that a trademark "generally speaking . . . [is] applicable to the vendible commodity to which it is affixed . . ." *American Steel Foundries v. Robertson*, 269 U.S. 372, 380 (1925). A trademark, then, indicates both "a commodity's origin and the quality of the commodity . . ." *Old Dearborn Distributing Company v. Seagram Distillers Corp.*, 299 U.S. 183, 194 (1936).

The Ninth Circuit Court of Appeals itself has recognized that "the historical conception of a trademark as a strict emblem of source of the product to which it attaches has largely been abandoned. The burgeoning business of franchising has made trademark licensing a widespread commercial practice and has resulted in the development of a new rationale for trademarks as representations of product quality." *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43, 48 (9th Cir. 1971); *cert. denied*, 405 U.S. 955 (1972). The current Ninth Circuit's emphasis on the source indication function is therefore contrary to its own earlier recognition of economic reality. In actuality, when consumers buy a trademarked product, they rarely know or care what company makes the product.⁸

The Ninth Circuit was manifestly not required by prior trademark law nor was it required by the realities of the commercial world to craft a new trademark standard. The artificiality of the approach taken by the Ninth Circuit is best illustrated by reviewing the survey evidence on which it relied to set aside the district court's findings of fact.

⁸ 1 McCarthy, *Trademarks And Unfair Competition*, § 3:4 at 94 (1973); 3 Callman, *The Law of Unfair Competition, Trademarks And Monopolies*, § 82.2(a) (3d Ed. 1969).

The evidence was in the form of a "motivational" survey conducted among randomly selected interviewees by telephone. First, the interviewees were "screened" to see if they had the proper qualifications for proceeding further with the interrogation. The screening was accomplished by asking the respondent if he was familiar with the MONOPOLY game. If he answered affirmatively, a second question was posed as to whether he had purchased the MONOPOLY game within the past couple of years or whether he intended to purchase it in the near future. A second screening then took place and only respondents who indicated they had recently purchased the MONOPOLY game or intended to purchase it in the near future were questioned further. The survey group was thus narrowed to only people who knew the game and who had purchased it or were thinking of purchasing it in the near future because they liked its features. The respondents were then given a choice of two statements and were asked to *choose between them*. The first statement was "I want a MONOPOLY game primarily because I am interested in playing MONOPOLY, I don't much care who makes it." The second and alternate choice was the following statement: "I would buy Parker Brothers MONOPOLY game primarily because I like Parker Brothers products."

Sixty-five percent chose the first statement in which they indicated they would buy the game because of its desirable playing features. Surprisingly, in view of the "Alice in Wonderland" nature of the second question, 32% said they would buy the MONOPOLY game primarily because "I like Parker Brothers products."

At no point in this highly structured survey, was any respondent given the choice of saying that he would buy the MONOPOLY game both because he liked the way it played and also because he had confidence in its source, Parker Brothers.

Clearly, the survey was structured to fly in the face of reality. It defies reason to suggest that people buy products just to be nice to the manufacturer. The reality of the market is that products are purchased because of their desirable features. The consumer is also concerned that those desirable features would be present in future purchases and he looks for the same trademark identifier to ensure such product quality continuity. Trademarks do serve a dual function, both to identify desirable features and to insure their continuity from a reliable even though it may be an anonymous source. The decision of the Ninth Circuit erroneously ignores this reality and fails to apply the prior trademark decisions by this Court and by the Ninth Circuit.

II. THE COURT OF APPEALS DECISION CANCELING THE MONOPOLY TRADEMARK REGISTRATION DESPITE ITS "INCONTESTABLE" STATUS IS CONTRARY TO THE FEDERAL TRADEMARK STATUTE

The current federal trademark statute, the Lanham Act of 1946, 15 U.S.C. §§ 1051-1127, was passed after extensive debate to replace the statute initially enacted in 1881 (21 Stat. 502) and amended in 1905, 1906 and 1920. The question decided by the Court of Appeals in this case—i.e., under what circumstances the owner of a registered trademark should lose his rights on the ground that the mark has become generic—was extensively debated before Congress,⁴ and language was carefully selected to provide a

⁴ The numerous reported hearings were intended for utilization by courts in interpreting the statute.

Representative Lanham. . . . "A court, in passing on a law of this character, looks, does it not, to the hearings of the House and the Senate for the expression of intent. And they would find that expression both in the House hearings and in the Senate hearings, with reference to a *generic term*." *Hearings on S.895*, 77th Cong., 2d Sess., p. 39 (1942). (Emphasis added)

statute of limitations on the time period within which a registration might be cancelled.

The Lanham Act provides that a certificate of registration "shall be *prima facie* evidence of the validity of the registration, registrant's ownership of the mark, and of registrant's exclusive right to use the mark in commerce . . ." 15 U.S.C. §§ 1957(b), 1115(a). The Act further provides that after five years of continuous use and registration, a mark may be granted incontestable status so long as the mark is not the "common descriptive name of any article or substance." 15 U.S.C. § 1065.

The trademark MONOPOLY was federally registered on July 30, 1935 and September 15, 1936 and was republished under the Lanham Act. The requirements of the incontestability section of the statute were subsequently complied with and the appropriate affidavit was filed. The Ninth Circuit did not decide whether MONOPOLY became "generic" before or after incontestable status was granted under the Act by acceptance by the Patent and Trademark Office of the appropriate affidavit.⁵ Indeed, the court did not even address the issue of whether the mark MONOPOLY still functioned as a trademark at that point in time. It clearly could not have done so, since the question of trademark significance was gathered during the pendency of the case—nearly 30 years after the filing and acceptance of the incontestability affidavit. In any event, however, the court was confronted with statutorily created presumptions of validity.

⁵ The court seems to have read the incontestability section as being inapplicable if at any time the mark becomes the 'common descriptive name' of the registered article. However, Section 15 provides that "no incontestable right shall be *acquired* in a mark which is the common descriptive name" of a product. Thus, the language suggests that the "common descriptive name" test for purposes of incontestable rights should be applied at the time of filing of the affidavit.

Representative Fritz G. Lanham, the statute's namesake and chief sponsor, characterized the incontestability section as "the establishment of a statute of limitations just as we have with reference to land and recorded deeds and things of that kind." *Hearings on S.895*, 77th Cong., 2d Sess., p. 15 (1942). If the trademark registration for MONOPOLY was incontestable, then the certificate of registration was *conclusive* evidence of the registrant's exclusive right to use the registered mark, except when one of the seven defenses or defects enumerated at 15 U.S.C. § 1115b is established.

If the trademark MONOPOLY was incontestable, the only statutory defense or defect⁶ which is arguably relevant to the facts of this case is § 1115b(2): "That the mark has been abandoned by the registrant." Abandonment is defined as: "when any course of conduct of the registrant, including acts of omission as well as commission, causes the mark to lose its significance as an indication of origin," 15 U.S.C. § 1127.

Although the term "generic" does not appear in the Act,⁷ the language ultimately adopted was carefully chosen to provide for such a contingency. Robert W. Byerly, who

⁶ The statutory defenses to incontestability are "presumably . . . all the defenses a man would have," *Hearings on S.895*, 77th Cong., 2d Sess., p. 49 (1942) and were believed sufficient to "provide adequate protection to the public and adequate protection of the goodwill and of the business of one who has built up property in and around his trademark." *Hearings on H.R. 82*, 78th Cong., 2d Sess., p. 112 (1944).

⁷ Amendments which would have inserted it were, however, proposed during the Congressional hearings. *See, e.g.* Hearings on S.895, 77th Cong., 2d Sess., p. 43 (1942); Hearings on H.R. 82, 78th Cong., 2d Sess., p. 103 (1944).

described himself as the "father" of the incontestability section,⁸ testified before Congressional hearings prior to passage of the 1946 Act as follows:

We certainly do not want to put anything in this bill, or at least, I should think we do not, which would destroy a man's trademark rights simply because he has conducted a successful business under that trademark and it has become well known.

If you read the decisions carefully, you will see that the courts at times have pointed out that generic meaning, where it has become merely a secondary meaning, has no effect on the trademarks.

* * *

(T)he decisions are not as uniform as one would wish . . . and *we felt that putting in the language defining abandonment was rather a definite way of dealing with it.*

* * *

I think you will find in almost all those cases that [there] has been either a deliberate intention, or rather extreme negligence on the part of the owner, which has allowed that what ought to be merely secondary significance of his trademark to creep in and be the primary significance. . . .

If he has been careless enough, or has deliberately done that, his mark is gone.

Under those circumstances, . . . the compromise language [of the Act] is quite sufficient to take care of the situation. [Hearings on H.R. 82, 78th Cong., 1st Sess., pp. 27-29 (1943)] (Emphasis added)

One year earlier, these same sentiments had been emphasized before Congress by the then-chairman of the Trademark Committee of the American Bar Association's

⁸ *Hearings on H.R. 82, 78th Cong., 1st Sess., p. 26 (1943).*

Section of Patents, Trademark and Copyright. Making no distinction as to marks which are incontestable and those that are not, Mr. W. H. Martin explained to Congress that "whether or not . . . a mark becomes generic . . . depends wholly upon what the trade-mark owner himself has done or failed to do." *Hearings on S.895*, 77th Cong., 2d Sess., p. 45 (1942).

It is thus clear that Congress intended that registered trademarks, whether they have been granted incontestable status or not, should not be invalidated based merely upon perceptions of members of the consuming public. Such trademarks must only be invalidated if the trademark owner himself has abandoned the mark by somehow causing it to lose its trademark significance. The Ninth Circuit did not make such an express finding of abandonment. On the contrary, the court made specific reference to the District Court's finding of fact that Parker Brothers had diligently and consistently promoted and policed the MONOPOLY mark.

Even if the Ninth Circuit had found that incontestable status had been improperly granted or that the defense of abandonment had been proven, the certificate of registration for the trademark MONOPOLY still served as *prima facie* evidence of the mark's validity. As to the evidentiary weight to be accorded registrations, Mr. Lanham took special pains to clarify the Congressional intent behind the establishment of incontestability:

Mr. LANHAM. Mr. Speaker, the legislative history of this act is long and extensive. Many hearings have been held over a period of almost eight years. Those hearings may, and probably will, be referred to by the courts in construing and interpreting the provisions of the act. However, there is one provision in the act which

has no recorded legislative history, and in order that the purpose and intent of the House may be made perfectly clear, I wish this statement to appear in the Record as an explanation of our intent and as a part of the legislative history of the act.

* * *

The prior statutes enacted by Congress on this subject provide that the certificates of registration shall be *prima facie* evidence of ownership and the right to use the mark. H. R. 1654 changes this rule and provides that "the right of the registrant to use such registered mark in commerce for the goods or services on or in connection with which such registered mark has been in continuous use for five consecutive years subsequent to the date of such registration and is still in use in commerce shall be *incontestable*" if the conditions of Section 15 of the Act are met. Section 33(a) of this act reenacts the *prima facie* evidence rule which is applicable from and after the date of registration of a mark under the act of March 3, 1981, the act of February 20, 1905, and under this bill. Section 33(b) provides that where the registered mark has become *incontestable* under Section 15, the certificate of registration shall be conclusive evidence of the registrant's "exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the certificate."

However, Section 33(b) contains seven exceptions to the rule that the certificate of registration shall be conclusive evidence of the rights of the registrant even where the provisions of Section 15 have been met.

* * *

It is clear from the language of the act and from the Congressional history of the act as it is found in the hearings and reports that the seven "defenses or defects" listed under paragraph (b) of Section 33 are intended to relate to and to affect the weight of the

evidence to be given to the certificate of registration where the owner claims the benefit of the incontestable rule and where the opposite party can, by the weight of the evidence, establish any one of the things listed in the seven subparagraphs in paragraph (b) . . . Under these circumstances, his certificate of registration is only *prima facie* evidence of his right and he must be prepared to carry the additional burden of proof as is necessary under the laws and statutes as they existed prior to the passage of this act. One of the valuable new rights created by the act is the incontestable right after five years' use of the mark and the corollary thereto that the certificate of registration is conclusive evidence of ownership and the right to the exclusive use of the mark.

* * *

This is the intent and effect and the only intent and effect of the seven subparagraphs of paragraph (b) of Section 33.

92 Cong. Rec. 7524, 79th Cong., 2d Sess., June 25, 1946.

From the foregoing, it is clear that the Ninth Circuit had before it a presumptively or even conclusively valid trademark. Despite this statutory validation and without proof of abandonment, the Ninth Circuit held that the trademark MONOPOLY was generic and therefore invalid. This decision conflicts with the policies which Congress sought to implement through careful selection of the language contained in the federal statute.

CONCLUSION

For the foregoing reasons, the Chamber respectfully urges this Court to grant the Petition for Certiorari.

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